

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 27, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: KENNETH WAYNE STIGER,

Movant.

No. 16-5111
(D.C. Nos. 4:09-CV-00194-CVE &
4:00-CR-00126-CVE-7)
(N.D. Okla.)

ORDER

Before **KELLY, HOLMES**, and **BACHARACH**, Circuit Judges.

Kenneth Wayne Stiger has filed a motion for authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. Because it does not appear the § 2255 motion Mr. Stiger seeks to file requires authorization, we dismiss the motion as unnecessary.

In 2003, Mr. Stiger was convicted after a jury trial of conspiracy to distribute narcotics, money laundering, and criminal forfeiture. He was sentenced to a mandatory term of life in prison under 21 U.S.C. § 841(b)(1)(A) because he committed a qualifying controlled substance offense after “two or more prior convictions for a felony drug offense ha[d] become final.” The two prior felony drug offenses used to enhance Mr. Stiger’s sentence were California state convictions—one for possession of a controlled substance (case A766131) and one for possession for sale of a controlled substance (case A776743).

On direct appeal, we affirmed the judgment of the district court, with the exception of Mr. Stiger's claim for a mistrial, which we remanded for an evidentiary hearing. *See United States v. Stiger*, 413 F.3d 1185, 1199 (10th Cir. 2005). On remand, the district court denied the motion for a mistrial, and we affirmed. *See United States v. Stiger*, 251 F. App'x 508, 509 (10th Cir. 2007).

In 2009, Mr. Stiger filed a § 2255 motion, which the district court denied. We dismissed his attempt to appeal from the denial because it was untimely.

Mr. Stiger now wishes to file another § 2255 motion to challenge his sentence. He alleges that in November 2014—years after his first § 2255 proceedings were finalized—the California voters passed Proposition 47. He explains that Proposition 47 recharacterized several categories of theft and drug-possession crimes from felonies to misdemeanors. In reliance on Proposition 47, Mr. Stiger filed an application in California state court to change the designation on his possession conviction in case A766131 from a felony to a misdemeanor. The court granted the application and changed the designation of Mr. Stiger's conviction, stating that his felony conviction has now been made a misdemeanor pursuant to Proposition 47. *See Mot. for Auth., Ex. 4.* Because he no longer has two prior convictions for *felony* drug offenses, he wants to file another § 2255 motion to reopen his federal sentence.


We have explained that “Congress placed strict limitations on ‘second or successive’ motions under § 2255, requiring that a defendant obtain circuit-court authorization before filing a second or successive motion and limiting the grounds for authorization.” *In re Weathersby*, 717 F.3d 1108, 1110 (10th Cir. 2013) (per curiam)

(citing 28 U.S.C. § 2255(h)). But in *Weathersby*, we held that a prisoner who sought to file another § 2255 motion to challenge his enhanced sentence based on state court convictions that had subsequently been vacated should not be subject to the authorization requirements in § 2255(h). *See id.* at 1110-11. We stated that, “if, as [the defendant] represents, the state court did not vacate his convictions until after his first § 2255 proceedings were concluded, so the basis for his proposed § 2255 claim did not exist when those proceedings were ongoing, his claim to reopen his federal sentence based on the state court’s vacatur is not ‘second or successive’ and does not require our prior authorization.” *Id.* at 1111.

We conclude that the reasoning in *Weathersby* should apply equally to Mr. Stiger’s situation. The California possession conviction that was used to enhance his federal sentence was changed from a felony to a misdemeanor in 2015—years after his first § 2255 proceedings were finalized. Accordingly, the basis for his proposed § 2255 claim did not exist when his first § 2255 proceedings were ongoing. His claim to reopen his federal sentence based on the state court’s order changing his conviction from a felony to a misdemeanor is therefore not “second or successive” and does not require authorization. In so concluding, we express no opinion on whether Mr. Stiger’s new claim is timely or on whether the claim would have any merit.

We dismiss Mr. Stiger’s motion for authorization as unnecessary.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk